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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DELONE NIEVES, Defendant and Appellant.	E053199 (Super.Ct.No. INF043901) O P I N I O N

APPEAL from the Superior Court of Riverside County. James S. Hawkins, Judge. Affirmed.

Allen G. Weinberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Peter Quon, Jr. and William M. Wood, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Following a June 2010 mistrial in which the jury was unable to reach a verdict, in November 2010 defendant and appellant Delone Nieves was retried before a second jury and found guilty as charged of the first degree premeditated murder of Steven Lewis. (Pen. Code, § 187, subd. (a), count 1.)[1] The jury in defendant's second trial also found that defendant committed the murder for the benefit of a criminal street gang (§ 186.22, subd. (b)), and personally and intentionally discharged a firearm causing great bodily injury or death in the commission of the murder (§ 12022.53, subds. (d), (e)). Defendant was sentenced to 50 years to life, 25 years to life for the murder plus 25 years to life for the discharge enhancement.

Defendant raises a single claim of error on this appeal, namely, that the trial court prejudicially erred in instructing the jury pursuant to the June 2007 version of CALCRIM No. 400 that: "[A] person is *equally guilty of the crime* whether he or she committed it personally or aided and abetted the perpetrator who committed it." (CALCRIM No. 400 (2008), p. 159, italics added.) Defendant claims the instruction erroneously and misleadingly told the jury that an aider and abettor is *always guilty* of the same crime as the direct perpetrator when, in fact, an aider may be guilty of a lesser crime if he or she acts with a less culpable mens rea than the perpetrator. (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1165; *People v. Nero* (2010) 181 Cal.App.4th 504, 513-518; *People v. Lopez* (2011) 198 Cal.App.4th 1106, 1117-1118.) In the context of this case, defendant

[1] All further statutory references are to the Penal Code unless otherwise indicated.

maintains that former CALCRIM No. 400 required the jury to find him guilty of first degree premeditated murder and precluded it from finding him guilty of the lesser offense of second degree murder. We disagree. In view of the instructions as a whole, we discern no reasonable likelihood that the jury interpreted former CALCRIM No. 400 as precluding it from finding defendant guilty of the lesser offense of second degree murder. We therefore affirm the judgment.

II. FACTS AND PROCEDURAL BACKGROUND

A. *Prosecution Evidence*

Around 1: 00 a.m. on April 6, 2003, police officers responded to a report of "shots fired with a man down" near the intersection of Daisy and Garden Streets in the Mayfair area of Indio. There, officers found a Black male, Steven Lewis, lying dead in the street in a pool of blood. Lewis was a member of Trey Nine, a predominantly Black criminal street gang, and had been selling drugs. The Mayfair area was part of Trey Nine gang territory. Before the shooting, tensions had been running high between the Trey Nine gang and its enemy, Jackson Terrace, a predominately Hispanic gang.

Christine Gonzales lived near the intersection of Daisy and Garden Streets and had known Lewis for several years. Shortly before the shooting, Christine, her brother Ray, and Lewis were sitting together and talking in Christine's father's truck, parked in front of her house. As Christine was getting out of the truck to go into her house and get Lewis a glass of water, someone whistled at Lewis to come to the corner of Daisy and Garden Streets, and Lewis began walking toward the corner.

Moments later, from inside her house, Christine heard gunshots. She and Ray ran down to the corner and found Lewis lying in the street, nearly dead, with multiple gunshot wounds. Christine saw the "shadows" of two people wearing black and running toward the apartments at the "dead end" of Daisy Street, but she could not identify them. She called 911.

The parties stipulated that, if called to testify, McStephon Hospedeles would state that he was driving a white truck near Daisy and Primrose Streets around 1:00 a.m. on April 6. He parked on Primrose and was approached by Lewis, who tried to sell him drugs. He drove away after he saw two or three people who appeared to be either light-skinned Blacks or Hispanics walking nearby. As soon as he began to drive away, he heard around eight gunshots.[2]

Shawn Rogers was with Lewis near the corner of Daisy and Garden Streets shortly before Lewis was shot. Lewis was talking to a man in a white pickup truck. Just after the man in the truck drove away, Rogers briefly spoke to Lewis again, then began walking away. When Rogers was about two houses away from Lewis, he heard gunfire, turned, and saw several gun flashes around 10 feet apart, which appeared to be coming from two guns. Rogers did not see who was firing the guns.

The investigation of the shooting led to three suspects, all members of the Jackson Terrace gang: (1) defendant, then age 18 and known as "Speedy," (2) Robert Palomino, then age 14 and known as "Lil Spanky," and (3) Mario Gonzalez, then age 24 or 25 and

[2] Hospedeles was deceased at the time of trial.

known as "Big Spanky." Several days after the shooting, on April 11, 2003, officers stopped a car that defendant was driving in Indio. Victor Torres, then age 14 and an associate of the Jackson Terrace gang, was a passenger in the car. After Torres attempted to flee with a shotgun, he and defendant were arrested, and were later interviewed at the police station about the Lewis shooting.

At trial, Torres testified that on the evening of April 5, 2003, he, defendant, and Palomino attended a rock concert in Palm Springs. After the concert ended around 11:00 p.m., they went to Gonzalez's house. There, Torres saw that defendant and Palomino each had guns. At one point, Torres overheard a conversation between defendant, Palomino, and Gonzalez; they were talking about "killing a mayate," meaning a Black person. Palomino was upset because Trey Nine members had disrespected him by going into his mother's yard and frightening his family. Defendant was not saying anything during the conversation, but his body language was indicating: "I got your back, let's go and do what we got to do."

Torres left Gonzalez's house around 12:30 a.m. on April 6. Around 1:00 a.m., Torres heard gunshots from inside his apartment. He ran outside and saw "two guys in hoodies running" toward Gonzalez's car and Gonzalez standing outside his car. The two guys in the hoodies got into Gonzalez's car, and Gonzalez drove off.

At Torres's apartment two or three days after the shooting, defendant told Torres that, according to a newspaper defendant brought with him, someone had been murdered in the area. At that point, Torres told defendant he had "seen everything." Defendant

told Torres to "keep [his] mouth shut" and that Palomino shot Lewis. Defendant also told Torres he was "there just to back . . . up" Palomino "in case of anything," but he knew Palomino was going to shoot someone.

Lewis was shot four times; two of the four bullets exited his body and two were recovered during the autopsy. One bullet entered his left shoulder and passed through his chest, perforating his lungs, aorta, and trachea, and lodged in his right arm. This bullet wound was fatal, and the three other wounds were potentially but not necessarily fatal. One of the bullets entered through the right abdomen and lodged in the spinal column; the other two entered through the chest and exited the back. One of these bullets created a shored exit wound on Lewis's back, which occurs if the bullet is "pressed up against something hard" as it exits, such as pavement or concrete.

Fourteen bullet casings were recovered from the scene; seven of these were fired by one .45-caliber handgun; the other seven were fired by a second .45-caliber handgun. The two bullets recovered from Lewis's body also came from two different guns.

During his police station interview, defendant admitted he was with Palomino at the time of the shooting, but did not want to be involved; he only wanted his friends to think he was helping, and he was very drunk at the time of the shooting. He claimed he only fired his gun to the side as Palomino fired directly at Lewis. He did not intend to hit Lewis when he shot to the side. After Lewis fell, Palomino walked up to Lewis, stood over him, and shot him two more times.

A gang expert concluded the shooting was "gang-motivated," regardless of whether defendant shot directly at Lewis or shot to the side. The shooting was still gang motivated because the evidence indicated that defendant was there to support and back up the shooter.

B. *Defense Evidence*

The defense did not present any affirmative evidence.

III. DISCUSSION

A. *Defendant's Contention*

Using the June 2007 version of CALCRIM No. 400, the trial court instructed the jury that: "[A] person can be guilty of committing a crime in a couple of ways. [¶] One, he may have directly committed the crime. That person is called the perpetrator. [¶] Two, he may have aided and abetted . . . a perpetrator who directly committed the crime. [¶] Now, a person is *equally guilty of the crime* whether he committed it personally or he aided and abetted the perpetrator in committing [the crime]." (Italics added.)

Defendant claims the "equally guilty of the crime" language in the fifth sentence of the instruction misdirected the jury that an aider and abettor and perpetrator are always "equally guilty" of the same crime, even if the aider and abettor acted with a less culpable mental state than the perpetrator. He argues that the instruction required the jury to find him guilty of premeditated first degree murder and precluded it from finding him guilty of the lesser offense of second degree murder—if the jury believed Palomino was the perpetrator and committed premeditated first degree murder, and defendant aided and

abetted Palomino in the commission of *that* crime, i.e., the crime of first degree premeditated murder.

B. *Forfeiture*

Before we address the merits of defendant's claim, we address the People's claim that defendant has forfeited his claim of instructional error by failing to raise it in the trial court. As the People point out, the form of CALCRIM No. 400 given here is generally a correct statement of law but can be incomplete or misleading in certain cases, such as when the evidence indicates that the defendant aided and abetted a crime but acted with a less culpable mental state than the perpetrator. (*People v. Samaniego, supra,* 172 Cal.App.4th at pp. 1164-1165.) "Generally, '"[a] party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language."' [Citations.]" (*Id.* at p. 1163.) Thus any claim of error in giving the form of CALCRIM No. 400 given here is forfeited unless an appropriate modification is requested. (*People v. Lopez, supra,* 198 Cal.App.4th at pp. 1118-1119; *People v. Samaniego, supra,* at p. 1163; but see *People v. Nero, supra,* 181 Cal.App.4th at pp. 513-518 [claim of error not forfeited when instruction reread in response to juror question whether aider could be guilty of lesser crime than perpetrator, and defense not given opportunity to modify instruction before rereading].)

Here, defense counsel did not ask the trial court to modify the instruction. Thus any claim of error in giving the instruction has been forfeited. But even if the claim of instructional error had been preserved for appeal, we would find it without merit.[3]

C. *The Form of CALCRIM No. 400 Given Here Was Not Misleading in View of Other Instructions Which Directed the Jury to Determine Whether Defendant Was Guilty of First or Second Degree Murder Based on Defendant's Own Mens Rea, Not Palomino's*

1. The Use of Former CALCRIM No. 400 Can Be Misleading

As a general rule, an aider and abettor and a direct perpetrator are "equally guilty" of the same crime. (*People v. Lopez, supra,* 198 Cal.App.4th at p. 1118.) But like all general rules, this general rule does not always apply. In certain circumstances, an aider

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[3] Because we reject defendant's claim on its merits, it is unnecessary to address defendant's alternative claim that his defense counsel rendered ineffective assistance in failing to ask the trial court to modify the instruction, or give the April 2010 version of CALCRIM No. 400 which was in effect at the time of trial in November 2010. (CALCRIM No. 400 (2011), p. 167.) The April 2010 version states: "A person is guilty of *a* crime whether he or she committed it personally or aided and abetted the perpetrator." (*Ibid.,* italics added.) By eliminating the word "equally" and referring to "a crime" instead of "the crime," the April 2010 version eliminates the possibility that CALCRIM No. 400 may be misleading or misstate the law in the manner defendant claims it was misleading and misstated the law in this case.

We further observe that the August 2009 version of the instruction, which was in effect immediately before the April 2010 version, bracketed the term "equally" and, like the June 2007 version used here, referred to "the crime," not "a crime." (CALCRIM No. 400 (2010), p. 167.) The Bench Notes to the August 2009 version state: "Before instructing the jury with the bracketed word 'equally,' the court should ascertain whether doing so would be in accord with the controlling principles articulated in *People v. McCoy* (2001) 25 Cal.4th 1111, 1115-1116 . . . and *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1166 . . . ." (*Ibid*.) If the bracketed term "equally" is used, the August 2009 and June 2007 versions are identical. (CALCRIM No. 400 (2008), p. 159.) The Bench Notes to the June 2007 version contain no advisements against using the word "equally" or the phrase "equally guilty of the crime" in any circumstances.

may be guilty of a greater or lesser crime than the perpetrator. (*People v. McCoy*, *supra*, 25 Cal.4th at pp. 1117-1122 [aider and abettor may be guilty of first degree murder even if perpetrator is guilty of manslaughter based on unreasonable self-defense]; *People v. Woods* (1992) 8 Cal.App.4th 1570, 1578-1579 [aider and abettor may be guilty of lesser crime than perpetrator when crime ultimately committed was not a reasonably foreseeable consequence of act aided and abetted].)

We note that in his opening brief defendant twice refers to the liability of an aider under the natural and probable consequences doctrine. But the prosecutor here did not proceed on that theory, and the trial court did not instruct on it. Thus we are not concerned with defendant's liability as an aider and abettor under the natural and probable consequences doctrine. The murder of Lewis was the crime defendant allegedly perpetrated or aided and abetted; no other target or intended crime, such as assault with a firearm, was alleged or raised by the evidence. (Cf. *People v. Woods, supra,* 8 Cal.App.4th at pp. 1577-1578 [evidence raised question whether first degree murder was a reasonably foreseeable or natural and probable consequence of armed assault].)

The present case concerns the second type of aiding and abetting liability—the one that arises outside the context of the natural and probable consequences doctrine and that turns more directly on the mens rea of the aider and abettor. (*People v. McCoy*, *supra*, 25 Cal.4th at pp. 1117-1122.) As *McCoy* explained, the mens reas of an aider and abettor is his or her "own" and may differ from the perpetrator's; an aider and abettor is liable for his or her own mens rea, not the perpetrator's. (*Id*. at p. 1118.) "Aider and abettor

liability is premised on the combined acts of all the principals, but on the aider and abettor's own mens rea." (*Id.* at p. 1120.)

McCoy thus concluded, based on the facts of the case before it, that "[i]f the mens reas of the aider and abettor is more culpable than the actual perpetrator's, the aider and abettor may be guilty of a more serious crime than the actual perpetrator." (*McCoy, supra,* 25 Cal.4th at p. 1120.) Though *McCoy* did not address whether an aider and abettor may be guilty of a *lesser* crime if he or she has a *less* culpable mental state than the perpetrator, "its reasoning leads inexorably to the further conclusion that an aider and abettor's guilt may also be less than the perpetrator's, if the aider and abettor has a less culpable mental state. [Citation.]" (*People v. Samaniego, supra,* 172 Cal.App.4th at p. 1164; accord, *People v. Nero, supra,* 181 Cal.App.4th at pp. 513-518 & *People v. Lopez, supra,* 198 Cal.App.4th at pp. 1118-1119.)

As a general proposition, we agree that the form of CALCRIM No. 400 given here *can* be misleading, particularly when there is evidence that defendant was an aider and abettor and acted with a less culpable mens reas than the perpetrator. (*People v. Nero, supra,* 181 Cal.App.4th at pp. 513-518 [finding CALJIC No. 3.00, identical to the form of CALCRIM No. 400 given here, prejudicially misleading]; but see *People v. Samaniego, supra,* 172 Cal.App.4th at p. 1165 [finding the form of CALCRIM No. 400 given here misleading but harmless beyond a reasonable doubt in view of other instructions and jury findings]; *People v. Lopez, supra,* 198 Cal.App.4th at pp. 1119-1120 [finding any error in giving former CALCRIM No. 400 harmless in view of other

instructions on defendant's mental state].) Indeed, if read in isolation, the statement that "[a] person is *equally guilty of the crime* whether he or she committed it personally or aided and abetted the perpetrator who committed it" (former CALCRIM No. 400) suggests that an aider and abettor and a direct perpetrator are *always* guilty of *the same crime*, even though that is not necessarily the case.

2. The Use of Former CALRIM No. 400 Here Was Not Misleading

The question here, however, is not whether the form of CALCRIM No. 400 given here was misleading when read in isolation, but whether in light of the instructions as a whole there is a reasonable likelihood the jury understood the instruction in the manner defendant claims—as requiring the jury to find him guilty of first degree premeditated murder if it believed Palomino was guilty of first degree premeditated murder and perpetrated the murder, and that defendant aided and abetted Palomino in the commission of *that* crime. (*People v. Pearson* (2012) 53 Cal.4th 306, 324 [instructions as a whole posed no reasonable likelihood of jury confusion on the point identified].) The answer is no. Based on the instructions as a whole, it is not reasonably likely that the jury interpreted the instruction as requiring it to find defendant guilty of first degree premeditated murder under any set of circumstances presented by the evidence.

First, defendant correctly points out that the evidence supported a reasonable inference that he was guilty of second degree murder, not first degree premeditated murder. Defendant told police he did not want to shoot Lewis and only wanted his friends to think he was helping Palomino shoot Lewis. Thus defendant claimed he did

not fire his gun directly at Lewis but only shot to the side and away from Lewis after Palomino began firing his gun directly at Lewis. Defendant also told Torres he did not shoot Lewis. And even though the jury necessarily found that defendant struck Lewis with at least one bullet by finding the personal and intentional discharge allegation true (§ 12022.53, subds. (d), (e) [personal and intentional discharge enhancement applies when discharge proximately causes great bodily injury or death]), defendant's statements to police and to Torres supported a reasonable inference that he shot Lewis on the spur of the moment and without premeditation and deliberation.

Bearing in mind the evidence that defendant may have acted with a less culpable mental state than Palomino, the jury was instructed to determine *in the first instance* whether defendant committed murder, either as a direct perpetrator or aider and abettor, *without* determining whether he acted with premeditation and deliberation. (CALCRIM Nos. 400, 401, 520.) CALCRIM No. 520 specifically instructed the jury to find defendant guilty of murder if it found (1) *he* committed an act that caused the death of another and (2) when *he* acted, *he* acted with either express or implied malice. The jury was further instructed pursuant to CALCRIM No. 520 that there were two kinds of malice aforethought, express malice and implied malice; proof of either is sufficient to establish the state of mind for murder; and defendant acted with express malice if he

intended to kill, but acted with implied malice if he deliberately committed an act he knew was dangerous to human life.[4]

The instructions on aiding and abetting, namely, former CALCRIM Nos. 400[5] and 401,[6] were relevant to the jury's determination of whether defendant was guilty of

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[4] CALCRIM No. 520 specifically told the jury: "There are two kinds of malice aforethought, express malice and implied malice. Proof of either is sufficient to establish the state of mind required for murder. [¶] The defendant acted with express malice if he unlawfully intended to kill. [¶] The defendant acted with implied malice if: [¶] 1. He intentionally committed an act; [¶] 2. The natural consequences of the act were dangerous to human life; [¶] 3. At the time he acted, he knew his act was dangerous to human life; [¶] AND [¶] 4. He deliberately acted with conscious disregard for human life. [¶] Malice aforethought does not require hatred or ill will toward the victim. It is a mental state that must be formed before the act that causes death is committed. It does not require deliberation or the passage of any particular period of time. [¶] An act causes death if the death is the direct, natural and probable consequence of the act and the death would not have happened without the act. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. [¶] There may be more than one cause of death. An act causes death only if it is a substantial factor in causing the death. A substantial factor is more than a trivial or remote factor. However, it does not need to be the only factor that causes the death.

[5] As indicated, the form of CALCRIM No. 400 given here instructed the jury: "A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. I will call that person the perpetrator. Two, he or she may have aided and abetted a perpetrator, who directly committed the crime. A person is *equally guilty of the crime* whether he or she committed it personally or aided and abetted the perpetrator who committed [the crime]." (Italics added.)

[6] CALCRIM No. 401 instructed the jury: "To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that: [¶] 1. The perpetrator committed the crime; [¶] 2. The defendant knew that the perpetrator intended to commit the crime; [¶] 3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; [¶] AND [¶] 4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime. [¶] Someone aids and abets a crime if he or she knows of the

[footnote continued on next page]

murder as an aider and abettor or direct perpetrator. Under any reasonable interpretation of CALCRIM Nos. 400, 401, and 520, the crime of *murder*—not first degree murder or second degree murder—was "the crime" defendant was alleged to have either directly perpetrated or aided and abetted Palomino in committing. (Former CALCRIM No. 400 ["[a] person is equally guilty of *the crime*"].)

Next, if the jury found that defendant committed murder, it was instructed to *then* determine whether he acted with premeditation and deliberation and was therefore guilty of first degree murder, or did not act with premeditation or deliberation and was guilty of second degree murder. (CALCRIM No. 521 (Murder: Degrees) (Pen. Code, § 189); *People v. Woods, supra,* 8 Cal.App.4th at p. 1578 [second degree murder is an intentional but unpremeditated killing, or a killing resulting from conduct inherently dangerous to human life].)[7] The jury was also instructed pursuant to CALCRIM No. 373 (Other

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perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime. . . ."

[7] CALCRIM No. 521 told the jury: "The defendant has been prosecuted for first degree murder under two theories: (1) deliberate and premeditated murder and (2) murder was committed by lying in wait. [¶] . . . [¶] The defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation. The defendant acted willfully if he intended to kill. The defendant acted deliberately if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant acted with premeditation if he decided to kill before committing the act that caused death. [¶] . . . [¶] All other murders are of the second degree. [¶] The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder." This instruction also told the jury: "The length of time the person spends

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Perpetrator) not to speculate about whether other persons who may have been involved in the murder had been or would be prosecuted, and to decide whether "the defendant on trial here committed the crime charged."

"'Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions.' [Citation.]" (*People v. Lopez, supra,* 198 Cal.App.4th at p. 1119, citing *People v. Sanchez* (2001) 26 Cal.4th 834, 852.) Thus here, even if the jury believed that Palomino was guilty of the first degree premeditated murder of Lewis—a question it was not asked to determine—the instructions as a whole did not *require* the jury to find defendant guilty of first degree premeditated murder or preclude it from finding him guilty of second degree murder.

We therefore disagree with defendant's assertion that former CALCRIM No. 400 reduced the prosecution's burden of proof by eliminating its need to prove that defendant acted with premeditation and deliberation. "'An instruction that omits or misdescribes an element of a charged offense violates the right to jury trial guaranteed by our federal Constitution, and the effect of this violation is measured against the harmless error test of *Chapman v. California* (1967) 386 U.S. 18, 24 . . . .' [Citation.]" (*People v. Nero, supra,* 181 Cal.App.4th at pp. 518-519, quoting *People v. Samaniego, supra,* 172 Cal.App.4th at

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considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time."

p. 1165.) Under the *Chapman* test, an appellate court may find the error harmless only if the jury's verdict would have been the same in its absence. (*Neder v. United States* (1999) 527 U.S. 1, 15.) Here, however, former CALCRIM No. 400 did not misdescribe an element of the charged offense of first degree premeditated murder or the lesser offense of second degree murder. Indeed, in the context of the instructions as a whole, former CALCRIM No. 400 was irrelevant to the jury's determination of whether defendant acted with premeditation and deliberation.

Lastly, defendant claims that in closing argument the prosecutor used the "equally guilty" language of former CALCRIM No. 400 in urging the jury to find him "equally guilty" of first degree premeditated murder "simply because [defendant] aided and abetted Palomino." This misstates the prosecutor's argument. The prosecutor *did not* urge the jury to find that defendant and Palomino were "equally guilty" of the first degree premeditated murder of Lewis based on Palomino's mens rea and simply because defendant aided and abetted Palomino in Palomino's commission of the crime of first degree premeditated murder. Instead, the prosecutor argued that defendant was guilty of first degree premeditated murder based on the evidence that *defendant* acted with premeditation and deliberation in accompanying Palomino to the scene, and shooting *his* gun when Palomino began shooting—regardless of whether the jury believed defendant directly perpetrated the murder by hitting and killing Lewis with bullets from defendant's gun or aided and abetted Palomino in the commission of the murder by firing his gun away from Lewis after Palomino began firing at Lewis. In sum, the prosecutor did not

urge the jury to find defendant guilty of first degree premeditated murder based on Palomino's mens rea, but on defendant's *own* mens rea, which the prosecutor argued was as culpable as Palomino's.

IV. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KING
J.

We concur:

RAMIREZ
P. J.

RICHLI
J.